



Department of Justice

STATEMENT

OF

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BEFORE THE

**SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE**

CONCERNING

**PROPOSALS TO AMEND
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978**

PRESENTED ON

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**Statement for the Record
of
James A. Baker, Counsel for Intelligence Policy, Department of Justice
Before
The Senate Select Committee on Intelligence
July 31, 2002**

I thank the Chairman and Vice-Chairman for inviting me here today to testify on proposals to amend the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. secs. 1801-1811 and 1821-1829, as amended (FISA or the Act).

Introduction

As Counsel for Intelligence Policy in the Department of Justice, I run the Office of Intelligence Policy and Review that prepares and presents all applications for electronic surveillance and physical search under the Act to the Foreign Intelligence Surveillance Court (FISA Court or Court). In that capacity, and operating within a system created and modified by Congress, I welcome the chance to provide the views of the Department on the nature and impact of the changes that have been proposed.

Let me first, however, report in this open forum what, in more detail, we have reported to our oversight committees on the Hill: Congress, in enacting the USA PATRIOT Act, Pub. L. 107-56 (2001), and the Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108 (2001), provided the Administration with important new tools that it has used regularly, and effectively, in its war on terrorism. The reforms in those measures have affected every single application made by the Department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going "up" on those suspected terrorists in the United States. One simple but important change that Congress made was to lengthen the time period for us to bring to court applications in support of Attorney General-authorized emergency FISAs. This modification has allowed us to make full and effective use of FISA's pre-existing emergency provisions to ensure that the government acts swiftly to respond to terrorist threats. Again, we are grateful for the tools Congress provided us last fall for the fight against terrorism. Thank you.

I now turn to the two legislative proposals under consideration by your Committee, S. 2586 and S. 2659. You have heard/will hear from my colleague from the FBI on operational developments that may bear upon your consideration of these two proposals; I will provide the Department's legal assessment of S. 2586. As I believe the Committee is already aware, I am unable at this time to provide such an assessment of S. 2659 as introduced or in versions that have been presented to us informally.

S. 2586

The Administration supports S. 2586. This legislation would amend Section 101(a)(4) of FISA, 50 U.S.C. sec. 1801(a)(4), to permit FISA coverage of "any person other than a United States person" engaged in international terrorism or activities in preparation therefor. Current law enables coverage of such an individual only if the Government can establish probable cause that he is an agent or member of an international terrorist organization.

The reforms of FISA in the USA PATRIOT Act and in last year's Intelligence Authorization Act all improved *how* we obtain and retain coverage of international terrorists and other targets defined in section 101 of FISA. S. 2586 would slightly change *who*, under the definitions of that section, can be covered under FISA.

The FBI will describe/has described complications that have occurred in the structures and patterns of international terrorism in past years. The planning by actual international terrorist groups may occur overseas and make it difficult for the FBI to connect an individual terrorist to his group abroad; the communication among international terrorists -- as actual close-knit groups or loose associations -- has become sophisticated and made identities and affiliations more difficult to determine; and the specter of freelancers, sympathizers and volunteers without any "agency" relationship with an international terrorist organization seems very real.

Moreover, a single international terrorist -- with or without the support of an international terrorist group -- can cause grave damage: One person can plant a bomb on an airplane; one person can send anthrax through the mail; one person can assassinate our political leaders; and one person can attack and kill U.S. intelligence officers.

S. 2586 takes account these changes in the structures and dynamics of international terrorism and enables us to meet this type of threat. The bill would, upon a finding by the FISA Court of probable cause that a non-U.S. person is engaged in international terrorism or in preparations therefor, extend coverage under FISA to include that non-U.S. person.

The Department has concluded that S. 2586 is constitutional. The extension of FISA to include an individual, non-U.S. person international terrorist would add only a modest, though vital, increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a "group" of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95-1283, at pt. 1, 74 and n.38 (1978). The governmental interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

In sum, the Administration believes that S. 2586 would be a constitutional and useful reform of FISA that reflects the changes in the structures and patterns of international terrorism that have

occurred in recent years. It is a small change in the *who* of FISA and a complement to the more comprehensive reforms in the *how* of that Act that the Congress passed last fall.

S. 2659

S. 2659 as introduced would, for FISA coverage of non-U.S. persons, amend Sections 105(a)(3) and 304(a)(3) of FISA, 50 U.S.C. secs. 1805(a)(3) and 1824(a)(3), to change the standard required for FISA surveillance or search from "probable cause" to "reasonable suspicion." Under S. 2659, in other words, the court could authorize electronic surveillance or physical search of a non-U.S. person upon facts constituting "reasonable suspicion" that (1) the non-U.S. person targeted is an agent of a foreign power, and (2) the facilities, places, premises, or property against which electronic surveillance or search is to be directed is used or about to be used by the target. Conforming changes would be made elsewhere in the sections of FISA. Authority for electronic surveillance or physical search of U.S. persons would remain at the current "probable cause" standard.

The Department of Justice has been studying Sen. DeWine's proposed legislation. Because the proposed change raises both significant legal and practical issues, the Administration is still in the process of evaluating this legislation.

Conclusion

In the meantime, I thank the Committee for the opportunity to present the views of the Department on the proposals before it today. Your consideration of these bills is a part of your continuing efforts to support this Nation's war against terrorism. We have appreciated the close oversight of Members and staff of the your Committee in these critical matters and the proposals that your attention and expertise have generated.

Once again, I want to express the gratitude of my office and of the Department for the tools you have given us to use in our Nation's war against terrorism. I would be pleased to answer any questions you may have in this forum or, if appropriate, in closed session. Thank you.